EDITOR'S NOTE

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ORIGINAL

No. _____

In the

Supreme Court of the United States

JUATASSA SIMS,

Petitioner,

vs.

KENNETH S. APFEL,
Commissioner of Social Security,

Respondent.

On Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Supreme Court, U.S.
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QUESTION PRESENTED

May a federal court, without any statutory or regulatory authority in support thereof, and contrary to the informal non-adversarial nature of the Social Security administrative appeal process, impose an "issue exhaustion" requirement upon Social Security claimants in federal court to bar issues that were not specifically raised by the claimant during the administrative appeal process.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Juatassa Sims (hereinafter "Sims"), respectfully petitions this Court to issue a *writ of certiorari* to review the November 6, 1998 opinion of the United States Court of Appeals for the Fifth Circuit (hereinafter "Fifth Circuit"), affirming the Commissioner of Social Security's final decision denying her application for Social Security benefits. Appendix at 1-2. Sims filed a timely petition for rehearing by the Fifth Circuit, which was denied by the Fifth Circuit on February 18, 1999. Appendix at 36.

The Fifth Circuit affirmed the Commissioner's decision, holding that it did not have jurisdiction to consider two of the three arguments Sims asserted on appeal because they were not raised before the Appeals Council. Appendix at 1-2. Because Sims believes that the Fifth Circuit's decision to apply issue exhaustion principles to bar her from raising the issues in federal district and circuit court conflicts with Supreme Court precedent and due to the express language of the statutes and regulations, as well as the non-adversarial informal nature of Social Security administrative appeal procedures, she hereby petitions for a *writ of certiorari*.

OPINIONS BELOW

On August 18, 1994, Sims filed applications for Social Security Disability Insurance (hereinafter "SSDI") and Supplemental Security Income (hereinafter "SSI") benefits, alleging disability commencing on April 1, 1992. Following the denial of her applications at the initial and reconsideration levels of review, the Administrative Law Judge, Edward T. Morriss (hereinafater "ALJ") denied Sims' claims for benefits by decision dated March 19, 1996. Sims requested review by the Appeals Council of the Social Security Administration on March 26, 1996, which was denied on May 13, 1997. Accordingly, the ALJ's decision became the Commissioner's final decision pursuant to 42 U.S.C. § 405(g).

Sims appealed to the United States District Court, Northern District of Mississippi, Delta Division, seeking review of the final decision of the Commissioner. On November 24, 1997, the United States Magistrate Judge, Eugene M. Bogen, filed his Report and Recommendation recommending affirmance of the Commissioner's decision. Appendix at 15-33. Sims subsequently filed Objections to the Magistrate Judge's Report and Recommendation. However, on January 9, 1998, the Honorable Neal B. Biggers, Jr. entered Final Judgment adopting the Report and Recommendation of the U.S. Magistrate Judge. Appendix at 3-4. The Final Judgment affirmed the decision of the Commissioner and denied Sims' claim for SSDI and SSI benefits. Id.

On February 27, 1998, Sims filed a Notice of Appeal of the January 9, 1998 Final Judgment to the Fifth Circuit Court of Appeals. Sims made three arguments in her Fifth Circuit brief. She argued that the Commissioner (1) failed to afford proper weight to the uncontroverted medical opinion of a psychologist; (2) improperly determined the extent of her residual functional capacity; and (3) violated his duty to order a consultative examination. The Fifth Circuit of Appeals rejected her arguments, and instead held that it did not have jurisdiction to consider the second and third arguments because they were not raised before the Appeals Council. Appendix at 1-2. By Order filed on February 18, 1999, the Fifth Circuit Court of Appeals denied Sims' Petition for Rehearing. Appendix at 36.

GROUNDS FOR JURISDICTION

By Order filed on February 18, 1999, the Fifth Circuit Court of Appeals denied Sims' Petition for Rehearing. The instant petition for a *writ of certiorari* is filed within 90 days of the denial of the petition for rehearing and is timely under Supreme Court Rules 13.3, 29.2, and 30.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED IN THIS CASE

The following statutes, 42 U.S.C. §§ 405(a) and 405(g) are at issue in the instant appeal:

42 U.S.C. § 405(a) Evidence, procedure, and certification for payments.

(a) Rules and regulations; procedures

The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

42 U.S.C. § 405(g) Judicial review.

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The

judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

The following regulations are at issue:

20 C.F.R. § 404.900 (1998)[1] Introduction.

(a) Explanation of the administrative review process. This subpart explains the procedures we follow in determining your rights under title II of the Social Security Act. The regulations describe the process of administrative review and explain your right to judicial review after you have taken all the necessary administrative steps. These procedures apply also to persons claiming certain benefits under title XVIII of the Act (Medicare); see 42 CFR 405.701(c). The administrative review process consists of several steps, which usually must be requested within certain time periods and in the following order:

(1) Initial determination. This is a determination we make about your entitlement or your continuing entitlement to benefits or about any other matter, as discussed in § 404.902, that gives you a right to further review.

(2) Reconsideration. If you are dissatisfied with an initial determination, you may ask us to reconsider it.

(3) Hearing before an administrative law judge. If you are dissatisfied with the reconsideration determination, you may request a hearing before an administrative law judge.

(4) Appeals Council review. If you are dissatisfied with the decision of the administrative law judge, you may request that the Appeals Council review the decision.

(5) Federal court review. When you have completed the steps of the administrative review process listed in paragraphs (a)(1) through (a)(4) of this section, we will have made our final decision. If you are dissatisfied with our final decision, you may request judicial review by filing an action in a Federal district court.

(6) Expedited appeals process. At some time after your initial determination has been reviewed, if you have no dispute with our findings of fact and our application and interpretation of the controlling laws, but you believe that a part of the law is unconstitutional, you may use the expedited appeals process. This process permits you to go directly to a Federal district court so that the constitutional issue may be resolved.

(b) Nature of the administrative review process. In making a determination or decision in your case, we conduct the administrative review process in an informal, nonadversary manner. In each step of the review process, you may present any information you feel is helpful to your case. Subject to the limitations on Appeals Council consideration of additional evidence (see §§ 404.970(b) and 404.976(b)), we will consider at each step of the review process any information you present as well as all the information in our records. You may present the information yourself or

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[1]All further references to the 1998 edition of the Code of Federal Regulations will be omitted.

have someone represent you, including an attorney. If you are dissatisfied with our decision in the review process, but do not take the next step within the stated time period, you will lose your right to further administrative review and your right to judicial review, unless you can show us that there was good cause for your failure to make a timely request for review.

20 C.F.R. § 404.975, Filing briefs with the Appeals Council.

Upon request, the Appeals Council shall give you and all other parties a reasonable opportunity to file briefs or other written statements about the facts and law relevant to the case.

20 C.F.R. § 404.976 Procedures before Appeals Council on Review.

(a) Limitation of issues. The Appeals Council may limit the issues it considers if it notifies you and the other parties of the issues it will review.

(b) Evidence.

(1) The Appeals Council will consider all the evidence in the administrative law judge hearing record as well as any new and material evidence submitted to it which relates to the period on or before the date of the administrative law judge hearing decision.

STATEMENT OF THE CASE

Sims seeks review of a judgment of the United States Court of Appeals for the Fifth Circuit. The basis for federal court jurisdiction in the court of the first instance, the U.S. District Court for the Northern District of Mississippi, was pursuant to 42 U.S.C. § 405(g), following issuance of a final decision by the Commissioner.

Sims petitions for a *writ of certiorari* to review the opinion of the Fifth Circuit affirming the decision of the district court, which affirmed the decision of the Commissioner. The following facts are material to consideration of the questions presented:

1. In her briefs filed before the Fifth Circuit, Sims argued that the administrative law judge erred as matter of law because he: (1) failed to afford proper weight to the uncontroverted medical opinion of a psychologist; (2) improperly determined the extent of her residual functional capacity; and (3) violated his duty to order a consultative examination.

2. The Fifth Circuit rejected her arguments, and instead held that it did not have jurisdiction to consider the second and third arguments because they were not raised before the Appeals Council.

3. Sims asserts that the Fifth Circuit erred in applying administrative exhaustion principles to a Social Security case, despite the lack of any Congressional or regulatory support for application of such principles in such cases.

4. Sims submits that the application of issue exhaustion principles in the context of Social Security cases conflicts with the informal non-adversarial nature of Social Security proceedings. Moreover, the application of such principles to Social Security matters violates the due process rights of claimants due to the Commissioner's failure to notify claimants that they risk waiving their right to raise arguments in federal court if they do not specifically raise

them before the Appeals Council.

REASONS FOR GRANTING THE WRIT: ARGUMENT

Petitioner Sims respectfully submits this case presents an important federal question of administrative law for which there are compelling reasons to grant the petition for a *writ of certiorari*. The Fifth Circuit failed to examine the Congressional and regulatory language or intent, prior to determining that issue exhaustion was appropriate, contrary to this Court's holding in *Darby v. Cisneros*, 113 S.Ct 2539 (1993). In *Darby*, this Court held that federal courts do not have the authority to require a claimant to exhaust available administrative remedies before seeking review where neither the relevant statute nor the agency rules specifically mandate or otherwise envision issue exhaustion as a prerequisite to judicial review. *Id.* Yet, the Fifth Circuit, in reliance on its prior holding in *Paul v. Shalala*, 29 F.3d 208, 210 (5th Cir. 1994), found that it did not have jurisdiction to consider two of Sims' arguments because they were not specifically raised to the Appeals Council. The Fifth Circuit's decision conflicts with established United States Supreme Court precedent, as neither the *Sims* decision nor the *Paul v. Shalala* decision contains any analysis of the pertinent statutory or regulatory provisions or of the nature of the Social Security administrative appeal process. The Fifth Circuit has impermissibly substituted its own views about proper administrative efficiency for the specific mechanisms that Congress and the Commissioner have chosen in violation of *Darby*.

This case raises an important issue that impacts an increasing number of claimants each year. Statistics maintained by the Social Security Administration document that in fiscal year 1997,

claimants seeking review of the Commissioner's decision filed 12,523 cases in federal court.[2] This figure represents a substantial increase from the 8,519 cases file in fiscal year 1996. An increasing number of these claimants will be deprived of the opportunity to have their day in court to vindicate their legal rights due to the application of the issue exhaustion doctrine to their cases.

Many claimants seeking Social Security and Supplemental Security Income benefits have mental disabilities and/or limited educational abilities, making them especially vulnerable. Indeed, this is the very reason that the Social Security Administration has adopted an informal, non-adversarial administrative review process. *See* 20 C.F.R. § 404.900(b). As noted by this Court, Social Security's administrative procedures should be "understandable to the layman claimant" rather than "comfortable only for the trained attorney," and should be "liberal and not strict in tone and operation." *Richardson v. Perales*, 402 U.S. 389, 400-01 (1971). The issue exhaustion doctrine undermines important rights of access to our courts by our society's disabled and elderly and results in the unjust deprivation of "the very means by which to live." *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

As a result of this non-adversary manner of review, many Social Security claimants either represent themselves, or have family members, social workers, or others assist them, or select non-attorney representatives, as specifically authorized by the Social Security Act. *See* 42 U.S.C. § 405(a). The application of issue exhaustion will have a profound, adverse effect on these claimants:

> Approximately one-half of all social security claimants are unable to obtain attorney representation and one-third are unable to secure any representation at all in SSA

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[2]These statistics were obtained from "Key Workload Indicators for Fiscal Year 1998" prepared by the Social Security Administration Office of Hearings and Appeals. The sources of these statistics is from the "Workload Production Report, Court Case Preparation and Review Branches."

> proceedings. When the cases are then pursued in court on appeal, important constitutional, statutory, and regulatory issues have often not been identified during the administrative proceedings. Because claimants have neither identified nor raised these issues before the agency, their legal claims are thereby precluded from judicial consideration — in large part, as a result of the absence of law-school trained counsel during the administrative adjudication. In addition, lawyers for benefit claimants are now dissuaded from accepting cases on appeal to federal court that were handled without legal counsel at the administrative level because of their awareness that new arguments raised in court may be procedurally barred. Claimants whose appeals are denied due to the court's refusal to consider potentially meritorious, yet unpreserved issues will, at best, lose several years of eligibility for often much-needed benefits and, at worst, be precluded from even filing a new benefit application due to the operation of res judicata.

Dubin, *Torquemada Meets Kafka: The Misapplication of the Issue Exhaustion Doctrine to Inquisatorial Administrative Proceedings*, 97 Colum. L. Rev. 1289 at 1294-1295 (1997) (hereinafter "Dubin").

Although courts are free to impose an exhaustion requirement as a matter of judicial discretion, "***of paramount importance***" to any exhaustion inquiry is ***congressional intent***. *Darby v. Cisneros*, 113 S.Ct. at 2543. This Court has also counseled that the application of the particular doctrine to specific cases requires an understanding of the purposes and of the particular administrative scheme involved. Dubin, at 1310, *citing McKart v. United States*, 89 S.Ct. 1657 (1969).

The Fifth Circuit failed to consider whether Congress ***intended*** that claimants be required to specifically raise an issue to the Appeals Council prior to being able to raise the issue in federal court. The Fifth Circuit also did not evaluate the non-adversarial nature of the Social Security administrative appeal process and whether its purposes would be served by requiring issue exhaustion in Social Security cases. Instead, the Fifth Circuit elected to apply a ***judicially-created*** doctrine in the Social Security context, despite the lack of any congressional or regulatory support.

Entitled "Judicial Review," 42 U.S.C. § 405(g) contains the parameters and procedures for obtaining judicial review of final decisions of the Commissioner of Social Security. The plain language of this section indicates that Congress never intended that issue exhaustion principles apply in Social Security matters, except, *arguably*, if the **agency enacted regulations** requiring issue exhaustion. Section 405(g) provides that any individual, after any final decision of the Commissioner of Social Security, **may obtain a review** of such decision by a civil action. The court shall have power to enter, **upon the pleadings and transcript of the record**, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The statutory language specifically provides that where the claimant failed to submit **proof** in conformity with any regulation as prescribed **by regulation,** the court shall review only the question of conformity with such regulations and the validity of such regulations. The following sentence of the section suggests that "proof" consists of *additional evidence*, as opposed to *legal arguments*.

The above statutory provisions strongly suggest that Congress wanted claimants to be able to obtain judicial review of the entire record and for issue exhaustion only to apply *if the agency enacted valid regulations requiring exhaustion where the claimant failed to submit adequate "proof" in conformity with regulations*. By specifically delineating a circumstance where issue exhaustion was required, Congress intended that issue exhaustion ***not be required*** in other circumstances.

Congress further delegated to the agency the power to establish its own rules and regulations and procedures "which are necessary and appropriate to carry out" the provisions of the Social Security Act. *See* 42 U.S.C. § 405(a). Yet, agency regulations also do not require the claimant to

specifically raise all issues to the Appeals Council to preserve the right to raise the same issues in district court. As set forth in 20 C.F.R. § 404.975, entitled "Filing Briefs with the Appeals Council," the Appeals Council shall give the claimant a reasonable opportunity to file briefs or other written statements about the facts and law relevant to the case. The regulation governing the filing of briefs to the Appeals Council does not require the claimant to specifically raise all issues in order to preserve the right to raise the same arguments in federal court. Indeed, 20 C.F.R. § 404.976, entitled "Procedures before Appeals Council on Review," specifically provides that the "Appeals Council may limit the issues it considers **if it notifies you and the other parties** of the issues it will review." *Id.* (Emphasis added). The same section also provides that the Appeals Council will consider all the evidence in the administrative law judge hearing record as well as any new and material evidence submitted to it which relates to the period on or before the date of the administrative law judge hearing decision. *Id.* The regulations further note that the "administrative review process [will be conducted] in an informal, nonadversary manner." 20 C.F.R. § 404.900.

In the current form of the regulations, the only issue that a claimant ***must raise*** administratively "at the earliest opportunity" to preserve the issue for judicial review is ALJ bias. 20 C.F.R. § 404.940. The fact that regulations specifically ***contain*** a section requiring the issue of ALJ bias to be raised administratively strongly suggests that the regulations **do not require issue exhaustion** in other situations.

It is apparent that the Social Security Administration has made a clear choice to maintain the informal nature of its administrative review procedures. The judicially created issue exhaustion doctrine not only harms claimants, but also it is an improper attempt by courts to impose procedures on the Agency that are inconsistent with its own informal, nonadversarial nature of Appeals Council

review.[3] *See* 20 C.F.R. § 404.900. This informal review process is essential to handle the growing number of claims filed each year before the Appeals Council. In fiscal year 1998, 110,159 cases were filed with the Appeals Council,[4] and it is apparent that the Agency "lacks sufficient time or resources to summon its 'expertise' and provide appropriate review" to these cases. Dubin at 1327.

Indeed, the Commissioner has initiated a pilot program to test the elimination of the Appeals Council review. *See* 20 C.F.R. § 404.966 (stating that the Commissioner is "establishing procedures . . . to test the elimination of the request for review by the Appeals Council" which will apply in randomly selected cases in which we have testes a combination of model procedures for modifying the disability claim process . . .). Additionally, as noted by Professor Dubin:

> In July 1995, the Council announced that it would 'temporarily suspend its practice including a specific response to contentions and discussion of additional evidence in notices denying requests for review.' Therefore, under current practice, no matter what 'contentions' claimants raise on administrative appeal, the Council will provide no specific responses to those arguments, thereby depriving the courts of even minimal guidance or reflection of agency 'expertise' for judicial review.

Dubin at 1329. Certainly, the judicially created issue exhaustion doctrine will have a profound impact on proceedings before the Appeals Council and impose changes which the agency has neither selected nor embraced. Indeed, the Agency will need to rewrite its entire regulatory procedures governing Appeals Council review in light of the imposition of the issue exhaustion doctrine by the courts.

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[3]While it is not part of the record, the Commissioner's General Counsel stated at a national Social Security conference that the Agency has adopted an informal policy not to apply the issue exhaustion doctrine to unrepresented claimants. Such a policy essentially ignores the judicially created issue exhaustion doctrine for a certain class of claimants. Obviously, such a selective enforcement of this doctrine has many due process implications.

[4]These figures were obtained from the same source as those obtained in footnote 2.

The adoption of the issue exhaustion doctrine will require the imposition of notices in all unfavorable hearing decisions, with warnings of the need to raise all issues to preserve the right to raise them in federal court. Such a requirement will force many claimants who now unrepresented or have family members, or other non-attorney representatives to seek legal counsel, and fundamentally change the nature of the Appeals Council review in a way that the Agency has not chosen to do. As stated in his learned law review article, Professor Dubin specifically concluded that "widespread application of issue exhaustion to SSA inquisitorial adjudication has far-reaching implications for the future of SSA judicial review, the nature of the once informal Appeals Council review, the manner and type of administrative representation, and the viability and fairness of the SSA's unusually informal administrative mode." Dubin at 1318.

In addition to the lack of Congressional and regulatory support for issue exhaustion in the Social Security context, the application of issue exhaustion weighs on the due process rights of Social Security claimants. Over the years, claimants have understood that a general request for Appeals Council review was all that was required to preserve their rights in federal court. Historically, claimants, relying upon the regulations and past history, did not submit detailed briefs to the Appeals Council. Issue exhaustion was not at issue. This was because Social Security cases have always been handled in an exceedingly informal manner, without any of the evidentiary protections generally afforded to plaintiffs in other more formal administrative contexts. *See* Dubin at 1303. Indeed, the formal rules of evidence do not even apply in Social Security hearings and the ALJ is required to "represent the claimant, represent the [Commissioner], and make an independent decision." *Id.*

Social Security regulations explicitly provide that the Appeals Council will "conduct the administrative review process in an informal, nonadversary manner." *Id.*, at 1305 *citing* 20 C.F.R.

404.900. To facilitate this informal appeal process, the SSA developed a one-page form to be filled out by claimants desiring Appeals Council review of the ALJ's hearing decision. 20 C.F.R. 422.205(a). The one page form provides the claimant with ***three lines of space*** to describe the ALJ's errors and his or her basis for administrative appeal. *Id.* This hardly supports an argument that the SSA intended that all issues be raised to avoid issue exhaustion in federal court. The claimant is instructed to present any information which he or she feels would be "helpful" to his or her case to the Appeals Council. *Id.* The regulations further state that "[s]ubject to the limitations on Appeals Council consideration of additional evidence, . . . we will consider at each step of the review process any information you present as well as all the information in our records." *Id.* The claimant is even invited to present the "information" his or herself or to have a representative. *Id.*

Most importantly, the regulation states that the claimant need only follow the required steps in a timely manner to preserve the right to judicial appeal. *Id.* Neither the regulations, statutes, nor the Commissioner notify the claimants that they will waive their rights to raise any issues that they did not raise in their appeal to the Appeals Council. To the contrary, claimants are led to believe that the only requirement is to fill out a form requesting Appeals Council review.

The Fifth Circuit failed to consider that issue exhaustion is simply incongruous with the Social Security administrative claim and appeal process. The imposition of issue exhaustion principles on the Social Security administrative appeal process is inconsistent with applicable statutes and regulations, with Congressional and regulatory intent, and with the self-proclaimed informal non-adversarial nature of the Social Security administrative appeal process. *See Richardson v. Perales*, 91 S.Ct. 1420 (1971).

Based on the precedent of *Darby v. Cisneros*, the Fifth Circuit failed to consider whether

Congress intended that issue exhaustion be required and whether the agency regulations required issue exhaustion. As indicated above, the statutory and regulatory provisions not only ***do not support*** the application of issue exhaustion principles in Social Security cases, but they also suggest, *by the inclusion of specific instances where issue exhaustion is or could be required*, that the ***current state of the statutory and regulatory law does not require issue exhaustion***.

Judges, who "are not part of either political branch of the Government," must not substitute their own judgments for decisions made by an agency that fall within the limits of the policymaking responsibilities delegated to the agency by Congress. *Chevron, U.S.A. v. Natural Res. Def. Council*, 104 S.Ct. 2778 (1984). While there is no dispute that the imposition of an issue exhaustion requirement *could be legislated by the Congress and implemented by the SSA*, ***to date, this has not occurred***, and indeed, is inconsistent with the currently informal nonadversarial Social Security administrative appeal process. Sims believes that the Fifth Circuit overstepped its boundaries when it decided to apply issue exhaustion principles to Sims' case. Not only did it fail to consider Congressional intent and the plain statutory and regulatory language governing the administrative appeal of Social Security cases, but it also substituted its own judgment for that of Congress and the SSA, as evidenced by the applicable legislation and regulations.

Sims submits that the Fifth Circuit failed to follow U.S. Supreme Court precedent governing the determination of whether issue exhaustion is appropriate in Social Security cases. In addition, the Fifth Circuit violated Sims' due process rights by enforcing the doctrine despite the Commissioner's failure to provide her with any notice of the requirement to raise all issues before the Appeals Council, else risk waiver. Appendix at 33. Based on the foregoing errors, Sims respectfully requests that this Court grant her petition for a *writ of certiorari* to allow her the opportunity to fully

brief the appropriateness of the application of issue exhaustion to Social Security proceedings.

CONCLUSION

For the foregoing reasons, Sims respectfully prays that this Court issue a *writ of certiorari* to review the OPINION of the United States Court of Appeals for the Fifth Circuit.

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No. _____

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vs.

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On Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Fifth Circuit

APPENDIX

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Mississippi Bar No. 4034

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IN THE UNITED STATES COURT OF APPEALS\

FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
NOV 06 1998
CHARLES R. FULBRUGE III
CLERK

No. 98-60126
Summary Calendar

JUATASSA SIMS,

Plaintiff-Appellant,

versus

KENNETH S. APFEL,
COMMISSIONER OF SOCIAL SECURITY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 2:97-CV-94-B

Before POLITZ, Chief Judge, STEWART and PARKER, Circuit Judges.

PER CURIAM:*

*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Juatassa Sims appeals the district court's affirmance of the Commissioner's denial of her application for disability insurance benefits, contending that the administrative law judge: (1) failed to afford proper weight to a psychologist's opinion that she was severely depressed; (2) improperly excluded certain of her impairments in assessing her residual function capacity; and (3) should have ordered a consultative examination to assess her mental impairments. We affirm.

We lack jurisdiction to review Sims's second and third contentions because they were not raised before the Appeals Council.[1] The first contention is without merit because the ALJ is entitled and expected to determine the credibility of medical experts and to weigh their opinions accordingly.[2] Concluding that the findings of the ALJ are supported by substantial evidence, the judgment appealed is AFFIRMED.[3]

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[1]**Paul v. Shalala**, 29 F.3d 208 (5th Cir. 1994).

[2]**Greenspan v. Shalala**, 38 F.3d 232 (5th Cir. 1994).

[3]**Villa v. Sullivan**, 895 F.2d 1019 (5th Cir. 1990).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JAN 12 1998

By N. Smith

JUATASSA SIMS
Plaintiff

V. NO. 2:97CV94-B-B

KENNETH S. APFEL, Commissioner
of Social Security
Defendant

FINAL JUDGMENT

Upon consideration of the file and records in this case, the court finds that the report and recommendation of the United States Magistrate Judge dated November 24, 1997, was on that date duly served by regular mail upon counsel of record for the plaintiff and the defendant. On December 11, 1997, this court received an objection to the Magistrate Judge's report and recommendation from the plaintiff. Upon due consideration, the court finds that the plaintiff's objection is without merit and that the report and recommendation of the United States Magistrate Judge should be approved and adopted as the opinion of the court. It is therefore ORDERED:

that the report and recommendation of the United States Magistrate Judge dated November 24, 1997, is approved and adopted as the opinion of the court, and that the proposed findings of fact and conclusions of law therein set out are adopted as the findings of fact and conclusions of law of the court; and

CoA 34

that the final decision of the Commissioner of Social Security is affirmed, and that this action is dismissed with prejudice.

THIS, the 9th day of January, 1998.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE

FILED

NOV 25 1997

NORMAN L. GILLESPIE, CLE
By D. Adams
Deput

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JUATASSA SIMS, Plaintiff

v. No. 2:97CV094-B-B

COMMISSIONER OF SOCIAL SECURITY, Defendant

REPORT AND RECOMMENDATIONS

On November 20, 1997 oral argument was heard by t magistrate judge in the above entitled action at Oxford pursuant t 28 U.S.C. §636(b)(4) and Local Rule M-5(c), at which plaintiff and defendant Commissioner were represented by their respective counsel.

This matter is before the court on an application by th plaintiff seeking judicial review under 42 U.S.C. §405(g) of the final decision of the Commissioner of Social Security denying her claims for disability insurance benefits under Title II of the Social Security Act and supplemental security income disability benefits under Title XVI.

The record shows that the plaintiff was born on April 27, 1951; that she has a high school education; and that her work experience has been as a cashier in a food store, order clerk at a distribution center, crimper at an auto parts manufacturer, and factory work at a hosiery mill and chair manufacturing plant. She has coverage for purposes of the special earnings requirement of

Title II of the Act through December 31, 1995. The plaintiff las worked on April 1, 1992, her claimed onset date of disability as result of anxiety/panic disorder, depression, thyroid enlargement cardiovascular system impairment, digestive system impairment hypertension, degenerative joint disease in her lumbar spine, an carpal tunnel syndrome.

FINDINGS OF THE ALJ

Applying the sequential evaluation process, 20 C.F.F §404.1520 (1992), the Administrative Law Judge (ALJ) found th plaintiff has not engaged in substantial gainful activity sin April 1, 1992, and that the medical evidence establishes tha plaintiff has degenerative disc disease of the lumbar spine, thyroid enlargement, possible carpal tunnel syndrome, exogenous obesity, depression, borderline intellectual functioning, and somatoform disorder, but that these impairments do not meet th listings.

The ALJ found that the plaintiff has the residual functional capacity to perform the exertional and non-exertional requirements of a reduced range of light work activity, reduced by mild to moderate difficulties with concentration and attention; and that plaintiff is unable to perform her past relevant work as a cashier/stock person or order picker/clerk. Having found the plaintiff unable to perform her past relevant work, the burden shifts to the Commissioner to show that she can perform a significant number of jobs existing in the national economy. Based on

vocational expert testimony, it was concluded that plaintiff coul perform such jobs as counter attendant, cashier/checker, genera officer clerk. (Findings, TR 12-21).

LAW AND ARGUMENT

The court's review is limited to whether or not substan tial evidence supports the Commissioner's decision Richardson v. Perales, 402 U.S. 389 (1971). Substantial evidence must be "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Id., at 401. Conflicts in the evidence are to be resolved by th Commissioner -- if there is substantial evidence to support the Commissioner's decision then the decision must be affirmed, even if there is evidence in the record which may support a contrar result. Selders v. Sullivan, 914 F.2d 614, 617 (5 Cir. 1990).

The Commissioner must apply a five-step sequential evaluation process to determine if a claimant is capable of engaging in substantial gainful activity: (1) a claimant who is working wil not be found disabled no matter what the medical findings are; (2) a claimant will not be found disabled unless he has a severe impairment; (3) a claimant whose impairment meets or equals a impairment listed in Appendix 1 of the regulations will be found disabled regardless of vocational factors; (4) a claimant who is capable of performing her prior relevant work will not be found disabled; and (5) if the claimant cannot perform her prior relevan work as a result of her impairment, then factors such as her age,

education, past work experience and residual functional capacity must be considered to determine whether she can do other work. Villa v. Sullivan, 895 F.2d 1019, 1022 (5 Cir. 1990). A finding that the claimant is or is not disabled at any step of the process terminates the evaluation. Harrell v. Bowen, 862 F.2d 471, 475 (5 Cir. 1988). The burden of proof is on the claimant for the first four steps, and then shifts to the Commissioner at step five. Anderson v. Sullivan, 887 F.2d 630, 632-33 (5 Cir. 1989).

At the hearing, plaintiff's primary contention was that there was only one examination and report of plaintiff's mental condition, that of Dr. Morris, and therefore the ALJ should have adopted his findings of marked limitations rather than substitute his own lay opinion. Counsel for the plaintiff also argued that contrary to the Commissioner's assertion that Dr. Morris was the only person noting a mental condition, the record contains several references to a mental problem -- TR 120, 132, 146, and 155.

The Commissioner argued at the hearing that there was other evidence to support the ALJ's finding that plaintiff had only slight to moderate limitations from her mental conditions. For instance, plaintiff indicated throughout her papers that she is disabled because of her back pain which began with the epidural administered at her son's birth (TR 68, 191). She has never sought any mental health treatment despite her contention that she is completely debilitated by depression and panic disorder. Although she contends that she cannot afford such treatment, and that she

does not receive Medicaid (TR 210-211), she does not indicate that she ever sought such treatment. Further, as discussed in the Commissioner's brief, the extent of plaintiff's treatment history consists of her hospitalization for the cesarean birth of her child in early 1992, three office visits with Dr. Pravin P. Patel, a general practitioner, and a one time cardiac consultative examination with Dr. J.S. Purdon. There is no record of any prior treatment for a mental condition, and Dr. Joe Ed Morris, who is the only examiner to note a mental impairment, has a documented history with Social Security of making similar findings for claimants referred by plaintiff's attorney.

The court also notes that Dr. Morris' finding that plaintiff is borderline mentally retarded does not comport with the rest of the record. For instance, Dr. Mayers found plaintiff to be cooperative, and to answer questions intelligently (TR 124). Plaintiff's testimony at the hearing was articulate, informed and intelligent (TR 177-217). Plaintiff even described herself as "smart" (TR 154, 209). This evidence contradicts Dr. Morris' finding and test results that she is suffering from borderline IQ and provides substantial evidence from which the ALJ could make a determination that her IQ is higher than the test implies. See Muse v. Sullivan, 925 F.2d 785 (5 Cir. 1991)(ALJ can determine IQ tests to be invalid if evidence supports that determination).

Thus, Dr. Morris' findings are controverted by othe evidence, and the ALJ did not err in finding that only part of Dr Morris' report should be adopted.

Other arguments raised in the briefs, but not argued a the hearing shall be addressed as follows.

Selected Use of the Record

Plaintiff complains that the ALJ selectively ignored th many references throughout the record to plaintiff's mental cond tion, particularly those set forth in Dr. Morris' report. Plainti contends that the ALJ ignored Dr. Morris' findings regarding her anxiety and depression.

The ALJ accepted Dr. Morris' findings of severe depression, somatoform disorder, and borderline intellectual functioning (TR 17). However, the ALJ rejected the severity and degree of limitation found by Dr. Morris because plaintiff had never bee treated for depression as one would expect if it were as severe a. Dr. Morris' found (TR 17). Further, despite Dr. Morris' findings regarding plaintiff's IQ, plaintiff reported that she was a straight "A" student throughout school (TR 154), and was described as "intelligent" by at least one observer (TR 64), and had a past work history of jobs requiring average intelligence (TR 189-190). This evidence is inconsistent with Dr. Morris' findings and belies plaintiff's claim that the ALJ selectively ignored the evidence.

AO 72A

Consultative Examination

Plaintiff contends that peculiarities in the medica evidence, particularly found in Dr. Mayers' report, should have alerted the ALJ to the necessity of ordering a consultative examination to explore the possibility of somatoform disorder as a cause for the irregularities, citing Latham v. Shalala, 36 F.3d 431 (5 Cir. 1994). Particularly, plaintiff states that Dr. Mayers' report that plaintiff complained of more pain on the left side o her body, but the objective findings indicated a weakness on the right, should have alerted the ALJ to a possible somatoform disorder.

The ALJ is not required to order consultative examinations unless the plaintiff has raised "the requisite suspicion" that the examination is necessary to discharge his responsibility to fully develop the record. Haywood v. Sullivan, 888 F.2d 146 1472 (5 Cir. 1989). The ALJ is not required to investigate al possible disabilities. Leggett v. Chater, 67 F.3d 558, 566 (5 Cir. 1995). Further, the ALJ has complete discretion over whether or not additional tests or medical evidence are necessary and a consultative examination is not required unless "the evidence as a whole, both medical and nonmedical, is not sufficient to support a decision..." 20 C.F.R. §404.1519a; Anderson v. Sullivan, 887 F.2d 630, 634 (5 Cir. 1987).

Defective Hypothetical

AO 72A

Plaintiff argues that the ALJ found plaintiff's condi tions of degenerative disc disease, thyroid enlargement, carpa tunnel syndrome, obesity, depression, borderline intelligence, an somatoform as severe impairments, but did not pose these impair ments in the form of a hypothetical to the vocational expert.

Whether or not the Commissioner carried the burden c proof at this step in the process depends upon the validity of t hypothetical questions posed to the vocational expert and wheth the questions reasonably incorporated the disabilities recognize by the ALJ. See Morris v. Bowen, 864 F.2d 333, 336 (5 Cir. 1988). The Fifth Circuit has recently articulated a test for determining whether or not a defective hypothetical may constitute reversibl error as follows:

> "Unless the hypothetical question posed to the vocational expert by the ALJ can be said to incorporate reasonably all disabilities of the claimant recognized by the ALJ, and the claimant or his representative is afforded the opportunity to correct deficiencies in the ALJ's questions by mentioning or suggesting to the vocational expert any purported defects in the hypothetical questions (including additional disabilities not recognized by the ALJ's findings and disabilities recognized but omitted from he question), a determination of non-disability based on such a defective question cannot stand."

Bowling v. Shalala, 36 F.3d 431, 436 (5 Cir. 1994).

The first hypothetical posed to the VE was as follows:

> "Assume I find the claimant is 44 years old. And a 12th grade education. And assume I find she can perform light work. And -- okay. Assume I find a mild to moderate difficulty with concentration and attention due to pain. She has moderate difficulty functioning due to depression and anxiety. Under that hypothetical, are there any jobs she could perform?"

(TR 214). The vocational expert answered that there were a numbe of jobs and listed them with the numbers available in the nationa economy (TR 214). The other two hypothetical questions adde severe difficulty with concentration due to pain, depression an anxiety and the VE responded that no jobs would be available t her. Plaintiff's counsel was present and could have added all c her claimed disabilities, regardless of what the ALJ ultimatel found to be severe impairments, yet counsel posed no questions t the VE.

The ALJ is not a Medical Expert

This argument is simply a different slant on plaintiff's complaints that the report of Dr. Morris should have been adopte in its entirety. The regulations grant the ALJ considerabl discretion in his review of the medical evidence, and where as her there is substantial evidence to support a decision contrary to on of plaintiff's physicians, this court must affirm it.

It is therefore recommended that the decision of the Commissioner be affirmed and the complaint dismissed with preju dice.

The parties are referred to Local Rule M-3(a) for the applicable procedure in the event any party desires to file objec tions to the findings and recommendations herein contained. The

parties are warned that any such objections are required to be i
writing and must be filed within ten days of this date. Failure t
timely file written objections to the proposed findings, conclu
sions and recommendations contained in this report will bar a
aggrieved party, except upon grounds of plain error, from attackin
on appeal unobjected-to proposed factual findings and lega
conclusions accepted by the district court. Douglass v. Unite
Services Automobile Association, 79 F.3d 1415 (5 Cir. 1996).

Respectfully submitted, this the 24th day of Novembe
1997.

UNITED STATES MAGISTRATE JUDGE

DEPARTMENT OF HEALTH & HUMAN SERVICES Social Security Administratio

Refer to: 587-48-0484

Office of Hearings and Appeals
100 W. Capitol Street
McCoy Federal Bldg., Suite 1014
Jackson, MS 39269
Telephone:
Date: MAR 19 1996

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NOTICE OF DECISION -- UNFAVORABLE

Jautassa R. Sims
P.O. Box 208
Como, MS 38619

I have made the enclosed decision in your case. Please read this notice and the decision carefully.

If You Disagree With The Decision

If you do not agree with my decision, you may file an appeal with the Appeals Council.

How To File An Appeal

To file an appeal you or your representative must request the Appeals Council to review the decision. You must make the request in writing. You may use our Request for Review form, HA-520, or write a letter.

You may file your request at any local Social Security office or a hearing office. You may also mail your request right to the Appeals Council, Office of Hearings and Appeals, 5107 Leesburg Pike, Falls Church, VA 22041-3255. Please put the Social Security number shown above on any appeal you file.

Time To File An Appeal

To file an appeal, you must file your request for review within 60 days from the date you get this notice.

The Appeals Council assumes you got the notice 5 days after the date shown above unless you show you did not get it within the 5-day period. The Council will dismiss a late request unless you show you had a good reason for not filing it on time.

See Next Page

Time To Submit New Evidence

You should submit any new evidence you wish to the Appeals Council to consider with your request for review. 10

How An Appeal Works

Our regulations state the rules the Appeals Council applies to decide whether to review a case and in reviewing a case. These rules appear in the Code of Federal Regulations, Title 20, Chapter III, Part 404 (Subpart J) and Part 416 (Subpart N).

If you file an appeal, the Council will consider all of my decision, even the parts with which you may agree. The Council will review your case if one of the reasons for review listed in our regulations exists.

Requesting review places the entire record of your case before the Council. Review can make any part of my decision fully or partially favorable or unfavorable to you.

On review, the Council may itself consider the issues and decide your case. The Council may also send it back to an Administrative Law Judge for a new decision.

The Appeals Council Can Review The Decision On Its Own Motion

The Appeals Council can review my decision even if you do not ask it to do so. If it decides to do that, the Council will mail you a notice about its review within 60 days from the date of this notice.

If No Appeal And No Review On The Appeals Council's Own Motion

If you do not appeal and the Council does not review my decision on its own motion, you will not have a right to court review. My decision will be a final decision that can be changed only under special rules.

New Application

You have the right to file a new application at any time, but filing a new application is not the same as appealing this decision. If you disagree with my decision and you file a new application instead of appealing, you might lose some benefits, or not qualify for any benefits. My decision could also be used to deny a new application for insurance benefits, if the facts and issues are the same. So, if you disagree with this decision, you should file an appeal within 60 days.

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Social Security Administration
OFFICE OF HEARINGS AND APPEALS

DECISION

IN THE CASE OF	CLAIM FOR
Jautassa R. Sims (Claimant)	Period of Disability, Disability Insurance Benefits, and Supplemental Security Income
(Wage Earner)	587-48-0484 (Social Security Number)

On August 3, 1994, the claimant protectively filed applications for a period of disability, disability insurance benefits, and supplemental security income. She alleges disability beginning April 1, 1992, due to degenerative joint disease of the lumbar spine and possible carpal tunnel syndrome. After initial and reconsideration denials, the claimant requested a hearing. A hearing was held before me on September 12, 1995, in Greenwood, Mississippi. The claimant and vocational expert Sam Cox appeared and testified. The claimant was represented by Gary Parvin, attorney at law.

ISSUES

The general issues are whether the claimant is entitled to a period of disability and disability insurance benefits under Sections 216(i) and 223, respectively, of the Social Security Act, as amended; and whether the claimant is disabled under Section 1614(a)(3)(A) of the Act. The Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months.

The specific issues are whether the claimant was under a "disability" and, if so, when such disability commenced and the duration thereof; and whether the disability insured status

Do You Have Any Questions? 11

If you have any questions, you may call, write or visit any Social Security office. If you visit an office, please bring this notice and decision with you. The telephone number of the local office that serves your area is (601)227-8472. Its address is 784 East Govan Street (0B14), SUITE J (0B14), Grenada, MS. 38901.

Edward T. Morriss
Administrative Law Judge

Enclosures

cc:
Gary R. Parvin
Attorney at Law
Rt. 2, Box 149C
Coffeeville, MS 38922

requirements of the Act are met for the purpose of entitlement to a period of disability and disability insurance benefits.

EVALUATION OF THE EVIDENCE

The claimant was born on April 27, 1951, and was forty years old on the alleged onset date, April 1, 1992. She has a high school education and has worked as a cashier in a food store, order clerk for a distribution center, crimper at an auto parts manufacturing plant, and worker at a hosiery mill and at a chair manufacturing plant. She met the disability insured status requirements on April 1, 1992, the alleged onset date, and continued to meet them through December 31, 1995. She has not engaged in substantial gainful activity since the alleged onset date, April 1, 1992.

At the hearing on September 12, 1995, the claimant testified that on a typical day she got her son off to school, went back to bed, and her mother came over to get her three year old to care for at her house when the claimant had nervous attacks (approximately three times a week). She stated that she cleaned one room at the time, watched some television, cooked on some days, did the washing with her daughter's help, and did some shopping. In describing her problems, she stated that she has back pain daily which began two months after the birth of her three year old son. She said that three times a month the pain is severe and she is unable to lift even ten pounds or walk as much as one fourth mile without having pain and shortness of breath. She was taking Naprosyn. In addition, the claimant stated that she has had very bad nerves and depression for twenty years, worse since 1992. She said that she has thought of "checking into" a mental health facility. According to the claimant, she has chest pain, rapid heart beat, sleeping problems, and thyroid problems. She stated that she used a heating pad for her back and that medications made her lightheaded. She said that her thyroid (gland) enlarged and felt like a "big lump" daily and that, if she got nervous, she rested for forty-five minutes to two hours. The claimant further testified that since March 1992 she has thought of suicide and has developed a plan. She said that she gained from 180 pounds to 224 pounds and had no energy. According to the claimant, no surgery has been suggested by the doctor who thought her problems would go away.

A review of the medical record shows that the claimant, when approximately eight months pregnant, was admitted to the hospital on February 7, 1992, for evaluation and further management of her pregnancy. She was given Macrodantin for a urinary tract infection and started on Inderal for fetal tachycardia. She began to feel much better and was discharged on February 9, 1992. On February 25, 1992, near the projected delivery date of her baby, she was admitted to the hospital with abdominal pain and was found to have a fibroid uterus, urinary tract infection, anemia, and gestational diabetes. She was treated and on February 26, 1992, delivered a baby boy by Caesarean section under epidural anesthesia. She also underwent bilateral tubal ligation. She was discharged on March 1, 1992. On March 4, 1992, the claimant presented to the emergency room complaining of her feet swelling, elevated blood pressure, and numbness in her left hand. Her blood pressure was 150/96 and she had 4+ pitting edema in her feet and legs. Diagnoses were hypertension and peripheral edema. Lasix was administered intramuscularly and she was given a prescription for Maxzine (Exhibit 16).

Office notes from Dr. Patel show that the claimant was seen on August 2, 1994, complaining of lower back pain two times a month since she had an epidural for a C-section. She said that two months after the epidural she developed chills up and down her spine. Examination revealed thyroidmegaly and tenderness in the L5-S1 area of the back. The doctor noted possible carpal tunnel syndrome. He prescribed Bactrim, Synthroid, Naprosyn, and Zoloft. On August 15, 1994, the doctor's impression was mild degenerative joint disease of the lumbosacral spine (Exhibit 17).

Dr. William Mayers saw the claimant on October 13, 1994, for a consultative examination. Her chief complaints were of back pain, thyroid problem, and weakness in her right arm. The claimant stated that she had an epidural anesthetic in February 1992, her back pain started in April 1992, and she has had it every day since then. She said that it is severe about one time a month, lasts for three or four days, and causes her to be bedridden. She stated that the pain radiated into both legs, the left worse than the right. She said that, when she did not have severe pain, the pain was aggravated by lifting, walking, standing, or sitting, and that she could lift ten pounds, walk only one block (due to pain in her back and shortness of breath), stand for five minutes, and sit for twenty to thirty minutes with

support to her back. She was taking Aleve, two to three times a day, for her back pain. She said that she could do her housework (taking her time) except for mopping. The claimant had an enlarged thyroid, present for five years. She was on Synthroid and said that, because of the enlargement, she had developed problems swallowing and sometimes had difficulty talking. She said that she had been told that the Synthroid might shrink her thyroid (gland) and she might be able to avoid surgery. Finally, she stated that the weakness in her right arm extended from her shoulder to her hand. She had no pain in her arm or hand unless she lifted something, and she had decreased grip strength in her right hand and occasionally dropped objects. Physical examination revealed height 5'4", weight 221 pounds, and blood pressure 131/79. Strength of the major muscle groups was 5/5 bilaterally. Grip strength was 5/5 on the left and 3/5 on the right. Straight leg raising was negative to 70 degrees on the left and was positive at 40 degrees on the right. Dr. Mayers commented that this was interesting because the claimant said she had more pain on the left when she had severe pain but on physical examination she had findings on the right. The claimant walked with a perceptible limp but did not use an assistive device. She was able to squat about three-fourths of the way but no further because of pain in her back. She could arise from this position and heel and toe walk without difficulty. Cranial nerves II-XII were intact. Deep tendon reflexes were not obtainable and Dr. Mayers could not obtain a reflex from biceps, triceps, brachioradialis, knee jerks, or ankle jerks. Pinprick was equal and normal bilaterally except for the lateral aspect of her right lower leg, corresponding with S1 dermatome. She had no decreased sensation of the right upper extremity. Dr. Mayers' impressions were: back pain, etiology undetermined, possibly degenerative disc disease; diffuse thyroid enlargement; and weakness, right hand and arm, possibly carpal tunnel syndrome. A chest x-ray was normal. Lumbar spine x-ray showed degenerative disc disease at L3-4 and L4-5 and a partially calcified cyst overlying the left side of the pelvis (Exhibit 18).

Office notes dated May 15, 1995, from Dr. Patel show that an echocardiogram showed LA slightly enlarged, aortic valve not thick--excursion within normal limits, mitral valve normal, LV post wall thin and its contraction poor. Dr. Patel referred her to two specialists (Exhibit 19)

On May 25, 1995, Dr. J. S. Purdon, a cardiologist, saw the claimant on referral from Dr. Patel. The claimant complained of a history of chest pain and some shortness of breath and fatigue. Dr. Purdon noted that much of this might be deconditioning. Physical examination revealed height 5'5 1/2 ", weight 224, and blood pressure 130/70. A stress exercise test was negative at 7 Mets energy expenditure and 94% of target heart rate. No arrhythmias were noted and after the test the claimant felt fine. Echocardiogram showed chamber sizes and left ventricular systolic function within normal limits. The mitral inflow pattern was at most borderline for diastolic dysfunction. No valvular abnormalities were appreciated and there was no evidence of effusion. After a thorough examination, Dr. Purdon diagnosed chest pain felt to be chest wall pain, possible element of reflux disease, hypothyroidism on treatment, and exogenous obesity. He commented the claimant's work-up was really negative for any sort of cardiac pain. He started her on Indocin 25 mg three times a day for five days, Pepcid 20 mg two times a day, and Flexeril one at bedtime for ten days (Exhibit 26).

On September 7, 1995, the claimant was seen by Dr. Joe Edward Morris, a psychologist, on referral from her representative, attorney Gary Parvin. On the Wechsler Adult Intelligence Scale-Revised (WAIS-R), the claimant obtained verbal, performance, and full scale IQ scores of 83, 72, and 81, respectively, which place her in the borderline range of intellectual functioning. On the Wide Range Achievement Test-Revised (WRAT-R), the claimant's scores on reading, spelling, and arithmetic were beginning of eleventh grade, beginning of eleventh grade, and beginning of tenth grade, respectively. These scores were somewhat higher than those on the WAIS-R and more within the average range. Dr. Morris stated that, cognitively, the claimant was able to understand and follow simple instructions and perform simple calculations. He said that she had symptoms of panic disorder and that she might have difficulty interacting with co-workers and receiving supervision because of her emotional instability. He diagnosed panic disorder with agoraphobia (provisional); major depressive disorder, recurrent, severe, without psychotic features, without interepisode recovery; undifferentiated somatoform disorder; borderline intellectual functioning; history of gestational diabetes, fibroid uterus, thyroid enlargement, carpal tunnel syndrome, and back pain (Exhibit 27).

After reviewing the evidence, I find that the claimant has "severe" impairments, degenerative disc disease of the lumbar spine, thyroid enlargement, possible carpal tunnel syndrome, exogenous obesity, depression, borderline intellectual functioning, and somatoform disorder. A Psychiatric Review Technique form has been completed and is appended to the decision. It properly addresses the claimant's diagnoses of depression at section 12.04, borderline intelligence at 12.05, panic disorder at 12.06, and somatoform disorder at 12.07. In evaluating the severity of the impairments under the "B" criteria of the Listings, I find that the claimant has moderate restriction of activities of daily living; moderate difficulty in maintaining social functioning; mild to moderate difficulties with concentration and attention; and that she has never had episodes of deterioration in job settings. Although Dr. Morris diagnosed panic disorder, in his summary of the claimant's daily activities he stated that she was able to drive a car short distances, go to the store, do light shopping, use the telephone, watch television, read mysteries, keep up with the news, and handle money--indicating that if she does have panic disorder, it is not marked. I do not credit Dr. Morris' finding of severe major depression as there is no history of mental health treatment as would be expected for such a severe case of depression. Dr. Morris stated that the claimant's concentration and attention "appear to be at least markedly affected." However, he also stated that the claimant was "cooperative and task oriented with good task persistence and completion." I acknowledge that her depression may cause moderate difficulties with functioning including mild to moderate difficulty with concentration and attention. The claimant has back pain which she has attributed to an epidural she received during a Caesarean section in 1992. However, there has been no consistent treatment for this and no evidence of a serious back problem from the consultative examination. Regarding her enlarged thyroid, the doctor has not suggested surgery and has stated that he believed that with medication the thyroid gland problem would go away. The claimant has not had a positive diagnosis of carpal tunnel syndrome by electromyography. Based on the record, her mental impairments and physical impairments do not meet or equal a listing in Appendix 1.

The claimant's impairments prevent her from performing some basic work activities such as lifting heavy weights and doing work that involves a high level of concentration. However, I find that she

is able to perform a reduced range of light work. In reaching this conclusion, I have specifically considered the claimant's subjective complaints, including pain. I considered the provisions of Regulations 404.1529 and 416.929, which stipulate that the effects of all symptoms, including pain, must be evaluated on the basis of a medically determinable impairment which can be expected to produce such symptoms. Further, I considered the provisions of Social Security Ruling 95-5p. Social Security Ruling 95-5p provides that all symptoms be considered in regard to their possible impact on the claimant's ability to function.

The claimant's daily activities, as described above in the report of the consultative examination by Dr. Mayers, in Dr. Morris' report, and at the hearing, indicate that the claimant's activities are only moderately restricted. The claimant is able to do household chores except mopping. Even though she has slightly decreased strength in her right hand, she can open a jar lid (if not tight), twist a doorknob, zip zippers, and button buttons. She had no joint tenderness of either hand. Range of motion of shoulders and elbows was full and strength in major muscle groups was 5/5 bilaterally. Although she could only squat three-fourths of the way down, she could heel and toe walk without difficulty and needed no assistive device for ambulating. As mentioned, there has been no consistent treatment for back trouble and there was no evidence of a serious back problem from the consultative examination. The heart specialist reported that the claimant's workup was negative for any sort of cardiac pain. According to the claimant's list of medications (undated), the claimant is taking Zoloft one a day for depression, Synthroid one a day for thyroid, and Advil and Aleve as needed for back pain. At the hearing, the claimant stated that she takes Naprosyn for back pain and that it makes her "lightheaded." However, there is no record of the claimant's complaining to doctors of adverse side effects of her medication. Based on the entire record, I find that the claimant's subjective complaints of pain and disability are not credible to the extent alleged.

At the hearing, vocational expert Sam Cox testified that the claimant's past work as a cashier/stock person was medium, semi-skilled; as an order picker/clerk was medium, unskilled; and as a clerk was medium, semi-skilled. When presented with a hypothetical question posing an individual forty-four years old, with a twelfth grade education, able to do light work, with mild

to moderate difficulty with concentration/attention due to pain, and moderate difficulty functioning due to depression, Mr. Cox stated that there are jobs that such an individual can do. He identified several representative suitable jobs in the light category and their approximate incidence: counter attendant (unskilled), 410,000 in the nation, 5,000 in the state; cashier/checker (semi-skilled), 531,000 in the nation, 6500 in the state; and general office clerk (unskilled), 2,248,000 in the nation, 18,000 in the state. As to the cashier/checker job, the vocational expert testified that skills would transfer from claimant's past work.

Based on the claimant's chronic back pain and diagnoses of degenerative disc disease and possible carpal tunnel syndrome, I find that she would not be able to return to her past relevant work because the exertional demands of the work exceed her present residual functional capacity. When a claimant establishes that she cannot perform her past relevant work because of her impairments or because she has no past relevant work, the burden shifts to the Secretary to show that the claimant can perform a significant number of jobs existing in the national economy which are consistent with her medically determinable impairments, functional limitations, age, education, and work experience. The vocational expert identified a number of such jobs in the light exertional category above.

Accordingly, I find that claimant Jautassa R. Sims is not disabled, within the meaning of the Social Security Act.

FINDINGS

After careful consideration of the entire record, I make the following findings:

1. The claimant met the disability insured status requirements of the Act on April 1, 1992, the date the claimant stated became unable to work, and continues to meet them through December 31, 1995.

2. The claimant has not engaged in substantial activity since April 1, 1992.

3. The medical evidence establishes that the claimant has "severe" impairments, degenerative disc disease, thyroid enlargement, possible carpal tunnel syndrome,

exogenous obesity, depression, borderline intelligence, and somatoform disorder, but that she does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.

4. The claimant's subjective complaints of pain and limitation are not credible to the extent alleged.

5. The claimant has the residual functional capacity to perform the physical exertion and nonexertional requirements of work except for being unable to lift more than 20 pounds and being unable to perform jobs precluded by mild to moderate difficulties with concentration and attention (20 CFR 404.1545 and 416.945).

6. The claimant is unable to perform her past relevant work as cashier/stock person or order picker/clerk.

7. The claimant's residual functional capacity for the full range of light work is reduced by being unable to perform work precluded by mild to moderate difficulties with concentration and attention.

8. On the alleged onset date, April 1, 1992, the claimant was 40 years old (now 44), which is defined as a younger person (20 CFR 404.1563 and 416.963).

9. The claimant has a high school education (20 CFR 404.1564 and 416.964).

10. Based on an exertional capacity for light work and the claimant's age, education, and work experience, the vocational expert identified jobs that she could perform.

12. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 CFR 404.1520(f) and 416.920(f)).

DECISION

It is my decision that, based on the application protectively filed on August 3, 1994, the claimant is not entitled to a period of disability or disability insurance benefits under sections 216(i) and 223, respectively, of the Social Security Act, and is not eligible for supplemental security income under sections 1602 and 1614(a)(3)(A) of the Act.

Edward T. Morriss
Administrative Law Judge

MAR 13 1996
Date

OHA PSYCHIATRIC REVIEW TECHNIQUE FORM

22

NAME: Jautassa R. Sims SSN: 587-48-0484

Assessment is for: Current Evaluation

Administrative Law Judge's Signature — Date

Edward J. Thomas — MAR 19 1998

I. MEDICAL SUMMARY

A. Medical Disposition(s): RFC Assessment Necessary (i.e., a severe impairment is present which does not meet or equal a listed impairment)

B. Based Upon Category(ies): 12.04, 12.05, 12.06, 12.07

II. Reviewer's Notes (Does not apply to OHA)

III. DOCUMENTATION OF FACTORS THAT EVIDENCE THE DISORDER (Evaluation of the existence of a sign or symptom CLUSTER or SYNDROME for the Listed Disorder.)

PRESENT	ABSENT			
[ ]	[x]	A.	12.02	Organic Mental Disorders
[ ]	[x]	B.	12.03	Schizophrenic, Paranoid and other Psychotic Disorders
[x]	[ ]	C.	12.04	Affective Disorders
[x]	[ ]	D.	12.05	Mental Retardation and Autism
[x]	[ ]	E.	12.06	Anxiety Related Disorders
[x]	[ ]	F.	12.07	Somatoform Disorders
[ ]	[x]	G.	12.08	Personality Disorders
[ ]	[x]	H.	12.09	Substance Addiction Disorders

C. 12.04 Affective Disorders - Disturbance of mood, accompanied by a full or partial manic or depressive syndrome, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1. [ ] [x] [ ] Depressive syndrome characterized by at least four of the following:

a. [ ] Anhedonia or pervasive loss of interest in almost all activities, or
b. [ ] Appetite disturbance with change in weight, or
c. [ ] Sleep disturbance, or
d. [ ] Psychomotor agitation or retardation, or
e. [ ] Decreased energy, or
f. [ ] Feelings of guilt or worthlessness, or
g. [ ] Difficulty concentrating or thinking, or
h. [ ] Thoughts of suicide, or
i. [ ] Hallucinations, delusions or paranoid thinking

2. [ ] [x] [ ] Manic syndrome characterized by at least three of the following:
a. [ ] Hyperactivity, or
b. [ ] Pressures of speech, or
c. [ ] Flight of ideas, or
d. [ ] Inflated self-esteem, or
e. [ ] Decreased need for sleep, or
f. [ ] Easy distractibility, or
g. [ ] Involvement in activities that have a high probability of painful consequences which are not recognized, or
h. [ ] Hallucinations, delusions or paranoid thinking

3. [ ] [x] [ ] Bipolar syndrome with a history of episodic periods manifested by the full symptomatic picture of both manic and depressive syndromes (and currently characterized by either or both syndromes)

4. [x] [ ] [ ] Other: depression

D. **12.05 Mental Retardation and Autism** - Significantly subaverage general intellectual functioning with deficits in adaptive behavior initially manifested during the developmental period (before age 22), or pervasive developmental disorder characterized by social and significant communicative deficits originating in the developmental period, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1.	[ ]	[x]	[ ]	Mental incapacity evidenced by dependence upon others for personal needs (e.g., toileting, eating, dressing or bathing) and inability to follow directions, such that the use of standardized measures of intellectual functioning is precluded*
2.	[ ]	[x]	[ ]	A valid verbal, performance, or full scale I.Q. of 59 or less*
3.	[ ]	[x]	[ ]	A valid verbal, performance, or full scale I.Q. of 60 to 70 inclusive and a physical or other mental impairment imposing additional and significant work-related limitation of function*
4.	[ ]	[x]	[ ]	A valid verbal, performance or full scale I.Q. of 60 to 70 inclusive or in the case of autism, gross deficits of social and communicative skills*
5.	[x]	[ ]	[ ]	Other: borderline intelligence

* NOTE: Items 1,2,3, and 4 correspond to Listings 12.05A, 12.05B, 12.05C, and 12.05D, respectively.

E. **12.06 Anxiety Related Disorders** - Anxiety as the predominant disturbance or anxiety experienced in the attempt to master symptoms, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1.	[ ]	[x]	[ ]	Generalized persistent anxiety accompanied by three of the following: a. [ ] Motor tension, or

				b. [ ] Autonomic hyperactivity, or c. [ ] Apprehensive expectation, or d. [ ] Vigilance and scanning
2.	[ ]	[x]	[ ]	A persistent irrational fear of a specific object, activity or situation which results in a compelling desire to avoid the dreaded object, activity, or situation
3.	[ ]	[x]	[ ]	Recurrent severe panic attacks manifested by a sudden unpredictable onset of intense apprehension, fear, terror, and sense of impending doom occurring on the average of at least once a week
4.	[ ]	[x]	[ ]	Recurrent obsessions or compulsions which are a source of marked distress
5.	[ ]	[x]	[ ]	Recurrent and intrusive recollections of a traumatic experience, which are a source of marked distress
6.	[x]	[ ]	[ ]	Other: some symptoms of panic disorder

F. **12.07 Somatoform Disorders** - Physical symptoms for which there are no demonstrable organic findings or known physiological mechanisms, as evidenced by at least one of the following:

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

1.	[ ]	[x]	[ ]	A history of multiple physical symptoms of several years duration beginning before age 30, that have caused the individual to take medicine frequently, see a physician often and alter life patterns significantly
2.	[ ]	[x]	[ ]	Persistent nonorganic disturbance of one of the following: a. [ ] Vision, or b. [ ] Speech, or c. [ ] Hearing, or d. [ ] Use of a limb, or e. [ ] Movement and its control (e.g., coordination disturbances, psychogenic seizures, akinesia, dyskinesia), or

			f. [ ]	Sensation (e.g., diminished or heightened)
3.	[ ]	[x]	[ ]	Unrealistic interpretation of physical signs or sensations associated with the preoccupation or belief that one has a serious disease or injury
4.	[x]	[ ]	[ ]	Other: focusing on and overexaggeration of somatic symptoms

IV. RATING OF IMPAIRMENT SEVERITY

A. "B" CRITERIA OF THE LISTINGS

THE FOLLOWING FUNCTIONAL LIMITATIONS (WHICH APPLY TO PARAGRAPH B OF LISTINGS 12.02-12.04 AND 12.06-12.08 AND PARAGRAPH D OF 12.05) EXIST AS A RESULT OF THE INDIVIDUAL'S MENTAL DISORDER(S).

NOTE: ITEMS 3 AND 4 BELOW ARE MORE THAN MEASURES OF FREQUENCY. DURATION AND EFFECTS OF THE DEFICIENCIES (ITEM 3) OR EPISODES (ITEM 4) ARE DISCUSSED IN THE DECISION.

Listing(s) under which the items below are being rated: 12.04, 12.05, 12.06, 12.07

FUNCTIONAL LIMITATION AND DEGREE OF LIMITATION

1. Restrictions of Activities of Daily Living:

None[ ] Slight[ ] Moderate[x] Marked*[ ] Extreme[ ] Insuff Evid[ ]

2. Difficulties in Maintaining Social Functioning:

None[ ] Slight[ ] Moderate[x] Marked*[ ] Extreme[ ] Insuff Evid[ ]

3. Deficiencies of Concentration, Persistence or Pace Resulting in Failure to Complete Tasks in a Timely Manner (in work settings or elsewhere):

Never[ ] Seldom[ ] Often[x] Frequent*[ ] Constant[ ] Insuff Evid[ ]

4. Episodes of Deterioration or Decompensation in Work or Work-Like Settings Which Cause the Individual to Withdraw from that Situation or to Experience Exacerbation of Signs and Symptoms (which may Include Deterioration of Adaptive Behaviors):

Never[x] Once/Twice[ ] Repeated*(3+)[ ] Continual[ ] Insuff Evid[ ]

*Degree of limitation that satisfies the Listings: Extreme, Constant and Continual also satisfy that requirement.

B. Summary of Functional Limitation Rating for "B" Criteria

NO. OF FUNCTIONAL LIMITATIONS MANIFESTED AT THE LISTING LEVEL: [0]
(The number must be at least 2 to satisfy the requirements of paragraph B in Listings 12.02, 12.03, 12.04 and 12.06 and paragraph D in 12.05; and at least 3 to satisfy the requirements in paragraph B in Listings 12.07 and 12.08.)

C. "C" Criteria of the Listings

2. If 12.06 Disorder (Anxiety Related)

PRESENT-ABSENT-INSUFFICIENT EVIDENCE

[ ] [x] [ ] Symptoms resulting in **complete** inability to function independently outside the area of one's home.

(If present is checked, the requirements in paragraph C of 12.06 are satisfied.)

SOCIAL SECURITY ADMINISTRATION

Refer to: TAHBP
587-48-0484

MAY 13 1997

Office of Hearings and Appeals
5107 Leesburg Pike
Falls Church, VA 22041-3255

ACTION OF APPEALS COUNCIL ON REQUEST FOR REVIEW

Mrs. Jautassa Sims
P. O. Box 208
Como, MS 38619

Dear Mrs. Sims:

The Appeals Council has considered the request for review of the Administrative Law Judge's decision issued on March 19, 1996.

Social Security Administration regulations provide that the Appeals Council will grant a request for review where: (1) there appears to be an abuse of discretion by the Administrative Law Judge; (2) there is an error of law; (3) the Administrative Law Judge's action, findings, or conclusions are not supported by substantial evidence; or (4) there is a broad policy or procedural issue which may affect the general public interest. The regulations also provide that where new and material evidence is submitted with the request for review, the entire record will be evaluated and review will be granted where the Appeals Council finds that the Administrative Law Judge's actions, findings, or conclusion is contrary to the weight of the evidence currently of record (20 CFR 404.970 and 416.1470).

The Appeals Council has concluded that there is no basis under the above regulations for granting your request for review. Accordingly, your request is denied and the Administrative Law Judge's decision stands as the final decision of the Commissioner of Social Security in your case. In reaching this conclusion, the Appeals Council has considered the applicable statutes, regulations, and rulings in effect as of the date of this action.

The Appeals Council has also considered the contentions raised in your representative's letter dated March 26, 1996, but concluded that the contentions do not provide a basis for changing the Administrative Law Judge's decision.

If you desire a court review of the Administrative Law Judge's decision, you may commence a civil action by filing a complaint in the United States District Court for the judicial district in which you reside within sixty (60) days from the date of the receipt of this letter. It will be presumed that this letter is received within five (5) days after the date shown above unless a reasonable showing to the contrary is made. The complaint should name the Commissioner of Social Security as the defendant and should include

the Social Security number(s) shown at the top of this notice. The right to court review is provided for in sections 205(g) and 1631(c)(3) of the Social Security Act, as amended (42 U.S.C. 405(g) and 1383(c)(3)).

If you cannot file your complaint within 60 days, you may ask the Appeals Council to extend the time in which you may begin a civil action. However, the Council will only extend the time if you provide a good reason for not meeting the deadline. Your reason(s) must be set forth clearly in your request.

If a civil action is commenced, the Commissioner must be served by sending a copy of the summons and complaint by registered or certified mail to the General Counsel, Social Security Administration, Room 611, Altmeyer Building, 6401 Security Boulevard, Baltimore, MD 21235. (See rules 4(c) and (i) of the Federal Rules of Civil Procedure). In addition, you must serve the United States Attorney for the district in which you file your complaint and the Attorney General of the United States, as provided in the Federal Rules of Civil Procedure.

Sincerely yours,

ORIGINAL SIGNED BY
Peter N. Dowd
Administrative Appeals Judge

cc:
Gary R. Parvin

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-60126

U.S. COURT OF APPEALS
FILED
FEB 18 1999
CHARLES R. FULBRUGE III
CLERK

JUATASSA SIMS

Plaintiff - Appellant

v.

KENNETH S APFEL, COMMISSIONER OF SOCIAL SECURITY

Defendant - Appellee

Appeal from the United States District Court for the Northern District of Mississippi, Oxford

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ON PETITION FOR REHEARING

Before POLITZ, Chief Judge, STEWART and PARKER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is Denied

ENTERED FOR THE COURT:

Henry A. Politz
Chief Judge

REHG-2

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

No. _____

RECEIVED
MAY 24 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the

Supreme Court of the United States

JUATASSA SIMS,

Petitioner,

vs.

KENNETH S. APFEL,
Commissioner of Social Security,

Respondent.

On Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Fifth Circuit

CERTIFICATE OF SERVICE

I, Robert Mario Bencivenga, a member of the bar of this Court, certify that on this date, May 19, 1999, pursuant to Supreme Court Rules 29.3 and 29.4, all parties required to be served have been served copies of the accompanying PETITION FOR A WRIT OF CERTIORARI.

I have served a copies of the PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding by depositing a copy of the above document in a sealed, first-class postage prepaid envelope, in a United States post office, said envelope being addressed to counsel of record and the Solicitor General at the following addresses:

SOLICITOR GENERAL OF THE UNITED STATES
Room 5614
Department of Justice
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

SCOTT E. HEFFINGTON
Assistant Regional Counsel
Office of the General Counsel
61 Forsythe Street, S.W., Suite 20T45
Atlanta, Georgia 30303
Counsel for Respondent, Commissioner of Social Security

RALPH M. DEAN
United States Attorney
Post Office Box 886
Oxford, Mississippi 38655
Counsel for Respondent, Commissioner of Social Security

DATED this 19th day of May, 1999.

Robert Mario Bencivenga

Robert Mario Bencivenga, Attorney at Law
Counsel of Record for Petitioner
P.O. Box 4692
Jacksonville, Florida 32201
(904) 388-8746

No. _____

In the

Supreme Court of the United States

JUATASSA SIMS,

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vs.

KENNETH S. APFEL,
Commissioner of Social Security,

Respondent.

On Petition for a Writ of Certiorari

To the United States Court of Appeals

For the Fifth Circuit

RECEIVED
MAY 25 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CERTIFICATE OF SERVICE

I, Robert Mario Bencivenga, a member of the bar of this Court, certify that on this date, May 24, 1999, pursuant to Supreme Court Rules 29.3 and 29.4, all parties required to be served have been served copies of the accompanying MOTION TO PROCEED *IN FORMA PAUPERIS*.

I have served a copies of the MOTION TO PROCEED *IN FORMA PAUPERIS* on each party to the above proceeding by depositing a copy of the above document in a sealed, first-class postage prepaid envelope, in a United States post office, said envelope being addressed to counsel of record and the Solicitor General at the following addresses:

SOLICITOR GENERAL OF THE UNITED STATES
Room 5614
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SCOTT E. HEFFINGTON
Assistant Regional Counsel
Office of the General Counsel
61 Forsythe Street, S.W., Suite 20T45
Atlanta, Georgia 30303
Counsel for Respondent, Commissioner of Social Security

RALPH M. DEAN
United States Attorney
Post Office Box 886
Oxford, Mississippi 38655
Counsel for Respondent, Commissioner of Social Security

DATED this 24th day of May, 1999.

Robert Mario Bencivenga, Attorney at Law
Counsel of Record for Petitioner
P.O. Box 4692
Jacksonville, Florida 32201
(904) 388-8746